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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND BRIEF

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America (hereinafter referred to the "National Chamber") moves for leave to file the attached brief *amicus curiae* in support of the respondent Reynolds Metals Company. Pursuant to Rule 42(3) of the Revised

Rules of this Court, consent to the filing of this brief was requested of the parties. Counsel for Petitioner agreed. Counsel for Respondent stated that it would neither consent nor withhold its consent but left such matter to the discretion of the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The issues in the instant case—religious accommodation by employers and election of remedies by employees with claims of alleged discrimination are matters of significant national concern. Virtually all employers, in all parts of the country, are engaged in interstate commerce and come within the provisions of Title VII of the Civil Rights Act of 1964. Further, a substantial number of these employers have collective bargaining agreements containing both no-discrimination clauses as well as grievance and arbitration procedures to resolve disputes arising under such agreements.

The major issue—that of Congressional intent relative to the claimed requirement of religious accommodation—has not been briefed by Petitioner or the *amici* in support of his position and thus the issue is not properly presented for the Court's consideration. Accordingly the interest of the National Chamber, in the outcome of this litigation, is vital and it requests leave to file this brief as amicus curiae urging affirm-

ance of the decision below, predicated on the substantial and far-reaching consequences that the result in this case will have for American industry.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMICUS CURIAE

I. STATEMENT OF THE CASE

This case is before the Court following extensive investigation and litigation before a wide variety of State and Federal administrative agencies, private voluntary labor arbitration and the lower Federal Courts. The facts underlying Petitioner's claim as well as a descriptive history of the prior investigation and liti-

gation are fully and amply set forth in the brief of Respondent Reynolds Metals Company. No useful purpose can be served by repeating it here except to point out, in an overview comment, that five of the seven tribunals that reviewed the facts and the law as to Petitioner's claim of religious discrimination under the Statute rejected his contention, several also asserting that he has had a complete adjudication of his rights in the forum of arbitration.

II. THE QUESTIONS PRESENTED

1. Whether under Section 703(a)(1) of the 1964 Civil Rights Act an employer is required to accommodate his business operations to conform to his employees' personal observance of individual religious practices?

2. Whether an employee who has sought arbitration of his claim for alleged wrongful discriminatory action in breach of a collective bargaining agreement is barred from bringing suit under the 1964 Civil Rights Act on the same claim after it has been adversely decided to him in the arbitration proceedings?

III. ARGUMENT

A. THE STATUTE IS DESIGNED TO PROHIBIT RELIGIOUS DISCRIMINATION—NOT ACT AS A VEHICLE FOR RELIGIOUS ACCOMMODATION

The Petitioner's brief as well as that of the *amiciae* in support of his position have all proceeded on the basis of an assumption of law not warranted by either the express language or the legislative history of the applicable statute.

The Court is presented with the instant case in the context of a refusal of an employer to make efforts—

reasonable or otherwise—to accommodate his business operations to the personal observance of individual religious practices by persons in his employ. Failure or refusal to do so, claims Petitioner and his supporters, constitutes religious discrimination, *per se,* in violation of Section 703(a)(1) of the 1964 Civil Rights Act.

We submit this context begs the question and is designed to lead the Court to view this case within a perimeter that is non-existent.

The threshold question ignored by the Petitioner which the Court must address itself to first is whether or not the legislation enacted by Congress intended to require the type of accommodation assumed herein by Petitioner. For the reasons set forth below the *amicus* submits that no such construction of the statute can be supported either by the express language or the legislative history. Further such argument if accepted by the Court will compel the Act to fall as violating the prohibitions of the First Amendment respecting establishment of religion for the true irony of Petitioner's contention, under close scrutiny, actually constitutes a proposition in favor of a form of "inverse religious discrimination" in violation of the Federal Constitution.

1. The intent of Congress was not to otherwise interfere with the normal operation of business in general

The legislative history of the Act confirms that it was aimed at ending discriminatory practices and artificial barriers that impeded persons from achieving equality of employment opportunity. As the Chief Justice observed speaking for this Court recently in

Griggs v. *Duke Power Co.*, —— U.S. ——, 39 LW 4317, 4319, 3 FEP Cases 175, 177 (1971):

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment. . ."

Nowhere in the Act is there language that begins to suggest that employers are to revamp or restructure their business operations to meet limitations and conditions laid down by individual employees working for them.

On the contrary the legislative history is expressly the opposite as the debates in the Congress confirm:

> "Similarly management prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." 1964 U.S. Code Cong. & A. News, pp. 2516.

What Petitioner is urging on the Court is that he is entitled to present his employer with a variety of conditions attached to his availability for work and that unless the employer meets those conditions the employee *per se* is a victim of discrimination. The Court has, in essence, rejected this contention: "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications." *Griggs* v. *Duke Power Co., supra* at —— U.S. ——, 39 LW 4319, 3 FEP Cases 177.

We submit, on the converse, that it is the employee who must be prepared to meet the job conditions

set forth by the employer and that the latter is entitled in the freedom of the labor market to specify its desires, provided that in so doing it does not create job conditions or requirements which cannot be fairly met on an open basis.[1]

Accommodations of employee religious beliefs frequently cannot be made without disruption of work schedules and development of inequitable personnel practices which may well have an adverse effect on employee morale. Many industries, such as petrochemicals, steel, aluminum, nonferrous metals and paper and allied products, are engaged in "continuous process" operations. Shift stability in "continuous process" industries is essential to avoid slowdowns, back-ups or wasted manpower and material. These industries operate 24 hours per day, 7 days per week, and require a stable work schedule of three 8-hour shifts. Entire shifts are rotated at intervals so that all employees work day as well as evening shifts on an equal basis.

Senators Clark and Case observed in their interpretative memorandum submitted jointly as Floor Managers of the House approved bill:

> "This exception [relating to the bona fide occupational qualifications] must not be confused with the right which all employers would have to hire and on the basis of general qualifications for the job, such as skill or intelligence."[2]

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[1] This latter condition was the vice condemned by the Court in *Griggs*.

[2] 110 Cong. Record 7213.

The *amicus* herein submits that under the legislative history availability for work on the same basis as other employees in the plant constitutes a primary employment requirement that is reasonably necessary to the normal operation of business enterprise. An employer can require that all of his employees meet minimum performance standards. *Phillips* v. *Martin Marietta Corp.*, —— U.S. ——, 39 LW 4160, 3 FEP Cases 40 (opinion of Marshall J. concurring).

It is thus clear that Congress did not intend the Civil Rights Act to exert an influence causing wholesale disruption of business throughout the country. Rather it desired an end be brought to those artificial practices that barred the avenue of economic opportunity to all Americans. The mainstream of the legislation was directed toward eliminating practices considered inimicable to the exercise of the rights of all citizens regardless of race, creed, color, sex, national origin and religion. For the Court to effect a transformation of this desirable piece of social legislation and create substantial upheaval of uniform, nondiscriminatory and orderly business practices would be indeed unfortunate.

2. The Civil Rights Act does not grant individuals the power to require other persons, including employers, to conform their ways to such individuals' religious beliefs

Section 703(a)(1) of the Civil Rights Act in relatively straightforward language provides *inter alia*, that an employer shall not discriminate against his employees because of their religion. Simply stated this means that no employer shall single out any particular employee because of his religious beliefs and attempt to treat him, for this reason alone, on a disparate

basis to his other employees. This is both a desirable and manifestly fair principle of social justice.[3]

However, this doctrine in the Petitioner's hands has been inverted to support the contention that employers in the operation of their businesses must take into account the religious belief of each individual employee and accommodate the mechanics of such operations to ebb and flow around the vagaries of such practices.[4] Contrary to Petitioner's assertion, that such was intended within the plain meaning of the statute is far from obvious. As Circuit Judge Weick stated in the Sixth Circuit's opinion below on rehearing:

> "Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious belief of another." *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334, 2 FEP Cases 868, 870.

Despite the fact that both opinions of the Circuit Court below rely extensively on the legislative history of the Act, Petitioner's brief, at no point cites any such history in support of his construction of the statute. Indeed he cannot for the entire scope of such history furnishes no documentary support of his argument here. The same is true of the briefs filed by the *amici curiae* in support of Petitioner.[5] Rather they

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[3] Respondent Reynolds concedes it does not question Dewey's right to follow the beliefs of his Church.

[4] As discussed *infra*, this places a well nigh, impossible practical burden on employers with large work forces having a wide cross section of religions represented.

[5] This should lead the Court to examine with great care Petitioners' "reading" of the statute.

rely upon the pronouncements of the Equal Employment Opportunity Commission. It was the Congress, however, that enacted the legislation in question not the Commission and it is to the former—not the latter—that this Court should look for guidance.

In short Dewey comes forward with *no* authority, save the EEOC itself[6] to support his reading of Section 703(a)(1). We submit that the construction of the statute by the Circuit Court below was correct and susceptible of no other reasonable interpretation. We further submit that no clearer statement of where Petitioner has gone wrong in this case can be found than in the Circuit Court's opinion on rehearing:

> "The fundamental error of Dewey and the *Amici Curiae* is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different." supra at 429 F.2d 335, 2 FEP Cases 871.

It is one thing for an employer to adopt a policy that it will not hire persons of a particular religious persuasion or, if they are employed, to inhibit their upward mobility within the Company. This the *amicus* here submits is an example of the type of religious discrimination Congress intended to proscribe under Section 703(a)(1). It falls far short of the arguments of Petitioner that the failure or refusal to adjust or rearrange uniform work practices likewise constitute an act of affirmative discrimination within the meaning of the statute.

So long as Reynolds is not selecting from among its employees, based upon their religious beliefs, it

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[6] Since the Act and its legislative history do not support the Commission's construction their "guidelines" here are not entitled to any deference. Cf. *Griggs* v. *Duke Power, supra.*

has not acted in a discriminatory manner in violation of the law. In no proper sense under the facts of this case can it be said that Reynolds discriminated against Dewey on the basis of his religious beliefs for Reynolds' policy is not one which either on its face—or in its effect—affirmatively discriminates against religion whether it be Dewey's or any other employee's working at the plant.

Dewey, in reality, is asking that he be singled out for special treatment *because of* his religion, from all the other employees at the plant. This result would appear to be the very antithesis of non-discriminatory treatment and was the opposite of the result sought by Congress in enacting the legislation. "Discriminatory preference for any group, minority or majority is precisely and only what Congress proscribed." *Griggs* v. *Duke Power Co., supra.* p. 39, LW 4319, 3 FEP Cases 177.

The Court below expressed the conclusion that employers ought not to be forced to accommodate each of the varying religious beliefs and practices of its employees. This makes plain sense. To hold otherwise is to conjure up a constant parade of workers from various religious backgrounds, coming and going to work on this day or that, depending upon their religious belief.

As Justice Douglas pointed out in his concurring opinion in *Sherbert* v. *Verner,* 374 U.S. 398, religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily; at pp. 411. Sabbatarians observe Saturday. Dewey respects Sunday. Can a line truly be drawn here?

This Court has only recently denied review of a case where that very proposition was recognized as being at the core of the controversy. *Stimpel* v. *State Personnel Board of the State of California,* 85 Cal. Rep. 797, 6 Cal. App. 3d 206 (1970), cert. den'd. Docket No. 701, 27 L. Ed. 2d 258 (Dec. 7, 1970).

The facts in *Stimpel* were virtually identical with those in the instant case except that the State of California was the employer as opposed to a private business concern. The California Court well envisioned the practical aspects of embracing a doctrine of wholesale religious accommodation:

> "The proliferation of religions with an infinite variety of tenets would, if the State is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the State. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the State, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." *Supra* at 6 Cal. App. 3d 209-10.

Nor it is an answer for the Petitioner to argue as he does that the worker is being compelled to choose between working and his religion. He is not being required to abandon his religious beliefs and nothing prevents him from seeking a job with no Sunday work.[7] To hold that all employers must make jobs available on *his* terms, i.e., consistent with his particular religious beliefs was never intended by Congress, would constitute a totally unwarranted enlargement of the statute, and for the reasons set forth below,

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[7] This is a more rational type of "accommodation" than the one urged by Petitioner and places the burden in the right place.

constitute a violation of the Establishment Clause of the First Amendment.

3. Compliance with the EEOC's guidelines presents serious practical problems to employers, employees, and job applicants

As earlier pointed out, the inherent nature of certain basic industries requires them to operate on a round the clock basis. Accommodations of employee religious beliefs frequently cannot be made without disruption of work schedules and development of inequitable personnel practices which may well have an adverse effect on the morale of other employees.

Further, in practical effect, will employers have to survey each and every employee and job applicant to discover his religious practices?[8] Moreover, the mere questioning of the employee concerning the sincerity of his beliefs which seems appropriate under the proposed rule, is a gross invasion of privacy. If, for example, an employee or job applicant refuses to divulge his religious tenets on personal grounds does he waive his right to an accommodation by the employer? Should an employee undergo a conversion of beliefs after hiring, must he be compelled to "register" his beliefs with his employer to insure the future accommodation of his newly-acquired religious beliefs? It is submitted that both employers, employees and job applicants will be subjected to onerous burdens of both conscience and compliance under the Commission's Guidelines.[9]

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[8] For example, does he possess religious beliefs and if so what holidays or restrictions on his work availability are liable to be present.

[9] The Court should also be aware that there are an infinite variety of problems also created under seniority clauses in union contracts too numerous to mention here.

However the will of Congress can be clearly seen in the interpretive Memorandum of Title VII prepared by Senators Clark and Case:[10]

> "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and *has no hidden meaning. To discriminate is to make a distinction, to make a difference in treatment or favor,* and those distinctions or differences in treatment or favor which are prohibited by Section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin. *Any other criterion or qualification for employment is not affected by this title.*" (emphasis supplied) 110 Cong. Record 7213.

In the case before the Court, there is not the slightest suggestion that the *employer* made any distinctions or differences in treatment. On the contrary it was Dewey, the employee, who was separating himself from the rest of the Company's work force. The employer did not enforce a rule which required work on Sunday. Rather, he enforced a rule which required employees to work whenever they were scheduled, *regardless of the day of the week.*[11] Thus, the employer truly made no distinction; employees were required to work whether they celebrated the Sabbath on Saturday, Tuesday, or Sunday. All employees were literally treated exactly the same under the provisions of a justifiable rule in a bona fide collective bargaining agreement.[12]

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[10] This is the very same source which the Court accorded great weight in its *Griggs* decision.

[11] This of course would have also affected any members of the Mosiem faith working at the plant.

[12] The only possible basis for a claim of discrimination would be if the otherwise valid rule were discriminatorily applied to only a certain group. Such a claim, however, is not present here.

Under these circumstances there is no discrimination within the meaning of the Act present here. It is only when "discrimination" is, by means of the alchemy of the EEOC, converted into "failure to accommodate" that the Petitioner's claim emerges. Such result however goes far beyond the intent of Congress as expressed in the Act and its legislative history. Accordingly, it must be rejected and correspondingly Petitioner's claim falls of its own weight.

4. The EEOC guidelines, if approved, render the statute unconstitutional

Assuming *arguendo* the Court finds the religious accommodation requirement was mandated by Congress, the Court is then faced with a serious Constitutional barrier.

The First Amendment is quite explicit and its intent well known to this Court. Its basic philosophy as regards religion is simple. The state will establish, favor, or support no religion. This Court expressed such philosophy in *McGowan* v. *Maryland*, 366 U.S. 420, 443, 6 L. Ed. 2d. 393, 406 (1961) reiterating that under the First Amendment the Federal Government cannot "pass laws which aid one religion, aid all religions or prefer one religion over another."

Neither support nor hostility, but neutrality is the goal of the religion clauses of the First Amendment. *Gillette* v. *United States, et al*, — U.S. —, 39 LW 4305 (1971).

In the instant case Congress violates its obligation of neutrality if it mandates that Reynolds accommodates the operation of its plant to the religious beliefs of Dewey or any other employee working there.

As Justice Marshall, speaking for the Court in *Gillette* observed:

> "... but the Establishment clause stands at least for the proposition that when government activities touch on the religious sphere they must be secular in purpose, evenhanded in operation and neutral in impact." *Supra,* 39 LW 4309.

While Petitioner relies heavily upon *Sherbert* v. *Verner, supra,* his case here does not quite reach the purview of the Free Exercise clause of the First Amendment for, in fact, nothing has been done either by Reynolds or the government to impede or otherwise infringe upon Dewey's *right* to believe in his church or any of its tenets. However, in asking the support of the government under Title VII, to compel other persons, such as Reynolds, to accommodate their ways to the pattern of his religious beliefs, he necessarily calls for the involvement of government to a degree that squarely contravenes the ban of the Establishment Clause. The Court, however reluctantly, must decide against him. To do otherwise is to condone government involvement in matters of religion to a point with no visable limitations.

Within the framework of reference alluded to by Justice Harlan in his concurring opinion in *Walz* v. *Tax Commission,* 397 U.S. 664, the degree of involvement sought by Dewey here would be a "continuing one calling for official and continuing surveillance leading to an impermissable degree of entanglement." *Supra* at p. 705. For as Justice Harlan had concluded:

> "In determining whether a particular government action breaches the establishment clause prohibition we must look not only at the executive purpose but also at the end result. We must be

sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree." Supra at p. 704.

This should come as no surprise to Petitioner here for this Court has repeatedly reaffirmed its statement in *Cantwell* v. *Connecticut,* 310 U.S. 296, that the First Amendment enhances two concepts freedom to believe and freedom to act. "The first is absolute, but in the nature of things, the second cannot be." *Supra* at pp. 303-4.

The religious accommodation urged by Petitioner cannot be made by this Court without striking a fatal blow at the heart of the Constitution. A foreseeable consequence is preferential treatment in the form of additional holidays or prime time off to those holding religious beliefs as opposed to those possessing atheistic or non-orthodox beliefs.

Dewey at bottom, is asking this Court to hold that a private employer must continue to employ one who is unavailable for work at various times if the unavailability stems from the exercise of his religious convictions. Reynolds he argues, must single out those whose behavior is religiously motivated, even though it denies such treatment to others whose identical behavior (in this case inability to work on Sundays) is not religiously motivated. Clearly the Statute is being utilized in support of preferential treatment for a religious belief without regard to its impact on the other employees in the plant. Thus a direct primary effect of acceptance of the Commission's Guidelines is the advancement of religion and particular religious sects. This the government cannot

do without directly violating the Establishment Clause of the First Amendment.

This Court was obviously of a like mind in December 1970 when it saw no reason to disturb the right of the State of California, as an employer, to require Stimpel to meet the uniform availability of work requirements for his job as a construction inspector. Similar reasoning dictates a similar result here.

It is precisely because of this distinction that *Sherbert* v. *Verner, supra,* becomes inapposite, for under the Court's decision there the State of South Carolina was not being compelled to make any accommodation.

Further that case involved state action not private action as the District Court below in Dewey noted.[13] And as Justice Brennan observed in the Court's opinion in *Sherbert,* recognition of the claimant's right to unemployment benefits under the statute did not "serve to abridge any other person's religious liberties." *Supra* at 374 U.S. 409.

Dewey on the other hand presents a case involving two private parties. In this sense it is set apart from most of the First Amendment cases which have been before the Court usually on a challenge to some specific act of a government body or authority. And unlike those other cases Petitioner seeks not a shield against discriminatory treatment he desires one for it with the support of the government. This it cannot furnish without running aground of the First Amendment.

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[13] This point obviously was of concern to District Judge Fox for he openly mused as to *Sherbert's* relevance on this ground. 300 F. Supp. 709, 714, 1 FEP Cases 759, 763 (1969).

The Circuit Court below well recognized the dangers inherent in the EEOC position:

> "To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. . . ." *Supra* at 429 F. 2d. 334, 2 FEP Cases 870.

The basic effect of the religious accommodation requirement is to promote the imposition of religious beliefs upon unwilling persons who are protected by the wall of the First Amendment guaranteeing separation of Church and State. The religious practices of the Petitioner may not be constitutionally promoted by the government even under the otherwise welcome standard of equal employment opportunity.

B. THE CIVIL RIGHTS ACT SHOULD NOT BE CONSTRUED TO INVEIGH AGAINST THE NATIONAL LABOR POLICY FAVORING VOLUNTARY ARBITRATION OF LABOR DISPUTES

From the time *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957), was decided this Court has followed a virtually unswerving path in making voluntary arbitration one of the keystones of the nation's labor policy. In the "Steelworker Trilogy" [14] the Court created the framework for the policy. Later cases added to the substance, particularly by making utilization of the grievance-arbitration provisions a prerequisite to a court suit. *Republic Steel Corp.* v.

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[14] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960), *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 46 LRRM 2416 (1960), *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

Maddox, 379 U.S. 650, 58 LRRM 2193 (1965), *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

Finally, in *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235, 74 LRRM 2257 (1970), the Court corrected the only deviation from its otherwise consistent path by holding that Federal courts have power to enjoin strikes in violation of a collective bargaining agreement where the issue in the strike is subject to an arbitration provision.

1. The National Labor Policy requires that arbitration awards be binding upon participating employees whose claims are considered

This Court for fourteen years has taken a consistent position regarding the appropriate forum for disputes between the parties to labor agreements: final and binding arbitration is the preferred method of settling disputes arising out of the employment relationship. The key to the acceptance of this policy is, of course, the "final and binding" nature of the arbitration.

The Court has recognized the necessity that the arbitration award be final and binding by heretofore requiring employees attempting to assert a claim previously considered by an arbitrator to first prove that they were unfairly represented in the arbitration proceeding. *Vaca* v. *Sipes, supra.*

The necessity for mutuality in the arbitration process was further emphasized in *Boys Markets.* As Mr. Justice Brennan noted:

> "The Sinclair decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary

of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." 74 LRRM 2263.

To carve out an exception to the carefully and consistently developed national labor policy, as Petitioner urges, is patently unfair to the employer. Currently 69% of the collective bargaining agreements in the country contain very explicit "no discrimination" clauses.[15] Most of these clauses are remarkably similar to the requirements of Title VII.[16]

However, employers confronted with the result urged by Petitioner (*i.e.* if the employer loses in arbitration it is final but if he wins the employee starts over in the courts) will quickly realize that this double exposure can be eliminated by excluding claims of discrimination from arbitration. It is submitted that such a result is both undesirable and unecessary.

2. The most desirable method for dealing with claims of discrimination is arbitration where such claims are cognizable under a labor agreement

Since the vast majority of labor agreements provide prohibitions against discrimination substantially similar to those provided by Title VII, arbitration provides

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[15] *Basic Patterns in Union Contracts*, 7th Ed. BNA, February 1971.

[16] A typical clause reads as follows: "Neither the Company nor the Union will discriminate in any manner against any employee because of race, religion, creed, national origin or sex as provided by Title VII Civil Rights Act 1964 as amended." Taken from the collective bargaining agreement between the Norwich Pharmacal Co. and Chemical Workers Union as published in *Collective Bargaining Negotiations and Contracts*, p. 95:482, BNA.

a ready-made forum for the handling of these claims with a number of advantages over the courts.

From the employee's point of view, arbitration provides faster relief if relief is warranted, is considerably less expensive since the union provides representation for him, and at the same time is generally considered fair.

From the employer's point of view, arbitration is faster,[17] less expensive, and is a method of dispute resolution with which he is familiar.

From the union's point of view, arbitration of discrimination claims permits it to represent the employees in *all* of their dealings with the employer, rather than fragmatizing the union's representation status.

It was these very same considerations which lead the Court to the result reached in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965). As the Court noted there:

> "And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> "A contrary rule which would permit an individual employee to completely side-step available grievance procedures in favor of a lawsuit has little to commend it." 379 U.S. at 653

In addition, arbitrators are undoubtedly better qualified to deal with claims of discrimination arising out of

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[17] This of course can be an extremely critical factor to both the employer and the employee when there is the possibility of back pay with running liability involved.

the employment relationship than are the courts. Arbitrators deal with questions of industrial practices including discipline and discharge on a day-to-day basis. Such daily contact equips them to readily distinguish between real and purported reasons for discipline and discharge. They are also familiar with the needs and practices of the employing industry and if necessary can make on site inspections. In *Steelworkers* v. *Warrior and Gulf Nav. Co.*, Mr. Justice Douglas compared the competence of the arbitrator and the courts and the courts with regard to industrial disputes.

> "The labor arbitrator performs functions which are not normal to the courts, the consideration which helps him fashion judgments may indeed be foreign to the competence of courts. . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 363 U.S. at 581-582.

The courts on the other hand are not only ill-suited to deal with these problems, but the tremendous increase in this type of litigation cannot help but exacerbate the growing crisis caused by overburdening caseloads.

3. The doctrine of collateral estoppel is properly applicable to claims of discrimination which have previously been voluntarily submitted to arbitration under a labor contract

Those who argue that an employee should not be bound by the arbitration award; base their argument on two grounds: (1) the employee is asserting two different rights, one contractual and the other statutory; and (2) the arbitrator may not consider the full statutory claim of the employee or may be precluded from doing so by some other section of the agreement.

As has already been shown, the first ground may not exist in a large number of cases where the contractual prohibitions on discrimination are virtually identical to the statutory prohibitions. In these cases there are not two separate rights, but rather one right expressed in two different places.

The second ground may be a valid consideration, but to hold that all arbitration awards are non-binding on the employee involved because some arbitrators may not consider the correct criteria is simply to throw the baby out with the bath water. Fortunately, such an all or nothing choice need not be made. The equitable doctrine of collateral estoppel is peculiarly suited for use by the courts in the situation here:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . . . the inquiry must always be as to the point of question actually litigated and determined in the original action, . . . only upon such matters is the judgment conclusive in another action. . ." *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). See also *Restatement of Judgments*, Sec. 68.

This doctrine has been invoked and applied to administrative proceedings under the Civil Service Act (*Bentley* v. *Teton*, 153 N.W. 2d 495) in the Court of Claims; (*Delatush* v. *United States*, 151 Ct. Cl. 405) and before the Interstate Commerce Commission (*N.Y.S. & W.R. Co.* v. *Central R. Co. of N. J.*, 156 NYS 2d 199).

The use of collateral estoppel by the district courts in the present circumstances would of course permit the employee who lost in arbitration to go to court.

The Court however would only hear the case if it found that the arbitrator's consideration of the claim under the labor agreement departed from the statutory standards or if it found procedural irregularities in the proceedings. Otherwise the case could be quickly disposed of on the employer's motion for summary judgment.

It is submitted that such an approach would be in conformity with Title VII and would enhance its effectiveness without detracting from the national labor policy or further overburdening the courts.

IV. CONCLUSION

For the foregoing reasons the decision of the Court below should be affirmed.

Respectfully submitted,

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